KUPPUSAMY BERAPANS

v.

ANGGAMAH RAMASAMY & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-31-663-87]
7 MAY 1991

LANDLORD AND TENANT: *Sub-tenancy - Various agreements entered into between parties - Validity - Whether covered under Control of Rent Act 1966 - Construction of relevant agreements and consent order - Better right to possesssion - Peaceful enjoyment - Whether interfered - Estoppel - Tenant to inform landlord of details of sub-tenancy - Control of Rent Act 1966, ss. 2, 10, 20(1)(a), 24 - Evidence Act 1950, s. 116 - Rules of the High Court 1980, O. 20 r. 11.*

In this case, various proceedings had been instituted by the parties in relation to the disputed premises. The plaintiff, K, alleged that he was a sub-tenant of the chief tenant R. On 31 July 1985, a certificate of decontrol of premises was issued in relation to the disputed promises to D2, the registered proprietor of the premises who then entered into an agreement with R (D2's 1985 agreement) for delivery of vacant possession of the premises by 30 April 1986.

On 9 April 1986, K and D2 entered into a memorandum of understanding (the said memorandum) whereby D2 granted a 3 year tenancy to K; the said memorandum was recorded as a consent order by the High Court on 11 April 1986 where it was stated that K "be allowed to occupy" the disputed premises.

Prior to this R attempted to recover vacant possession of the disputed premises from K by force as K's sub-tenancy was due to expire on 17 March 1986. K applied for an injunction restraining R from recovering possession except by due process of law as the sub-tenancy was an oral monthly tenancy. Another consent order was obtained whereby no repossession or re-entry was allowed until so granted by the Court. R then refused to perform his obligations under D2's 1985 agreement. K's solicitor also wrote to the Rent Tribunal arguing that the Tribunal had no right to decontrol the disputed premises - the Tribunal then revoked the certificate. D2 and R could not come to any agreement on the 1985 agreement and on June 1986, K executed a tenancy agreement with R where K was granted a perpetual tenancy. K paid rental direct to R who forwarded it to D2 who refused to accept the rentals on the basis that R was no longer a lawful tenant as he had surrendered the premises to K, an allegation which R denied.

In this action K sought the Court's determination as to whether D1 (R's widow) or D2 was the lawful landlord - K also obtained an interim injunction restraining D1 and D2 from interfering with.

Held:

[1] The use of the words "to occupy" in the consent order is an accidental slip on the part of Counsel for D and K - it is clear from the consent order that a tenancy was intended at all times. Therefore, the Court rectified the consent order under O. 20 r. 11of Rules of the High Court 1980 and substituted the words "be allowed to occupy" with the words "be granted a tenancy of".

[2] There is no evidence that K's enjoyment of peaceful occupation is being or will be interrupted and therefore, he is estopped by virtue of s. 116 of the Evidence Act 1950 from disputing the title of D2 as his landlord.

[3] K cannot rely on the purported tenancy of D1 which is at the most a subsidiary title, to question D2's title as his landlord unless K could show a better right to possession, which he could only do if he had entered into a tenancy agreement with a paramount title holder.

[4] In the circumstances of this case, it is impossible for K to establish that there is in existence a paramount title holder as D2 is the registered proprietor and K had acknowledged D2's status when he accepted a tenancy from D2. Consequently, K is precluded from asserting that there is someone else who holds a better title than D2.

[5] The June 1986 tenancy agreement between K and R was invalid because R, in purporting to sublet the disputed premises to K, had failed to comply with s. 20(1)(a) of the Control of Rent Act 1966 as he had not supplied D2 with details of the sub-tenant. Section 20(1) is a mandatory provision and failure to comply with this section renders any sub-tenancy agreement invalid.

[6] In addition, it is clear that 1986 tenancy agreement was a sham agreement entered into between K and R to deprive the rights of D2 as K's landlord.

[7] On the facts, it is clear that R had completely surrendered occupation of, or assigned his interest in, the disputed premises to K; therefore, neither R nor D1 can claim the protection of the Act and R had no right to execute the 1986 tenancy agreement.

[D2 held to be the lawful landlord of the disputed premises.]

Cases referred to:
Ban Seng v. Yap Pek Soo [1967] 2 MLJ 156
Farngu v. Ram AIR [1959] Punjab 564
Lee Piah Chee v. Sin Chia Soon [1948] MLJ 20
Lee Thim Pung v. Lim Seang Kea & Anor. [1949] MLJ 69
Rogers v. Hyde [1951] 2 KB 923
Scotch Leasing Sdn. Bhd. v. Perwira Bank (M) Bhd. [1987] CLJ (Rep) 974
Shipwight v. Clements 38 WR 746
Snook v. London & West Riding Investments Ltd. [1976] 2 QB 786
Tak Ming Co. v. Yee Sang Metal Supplies Co. [1973] 1 WLR 300
Tan Ah Seh v. Tan Pek Sui [1972] 2 MLJ 246
Tan Kim Kuan v. Liew Yew Sang [1973] 1 MLJ 213
Tay Bok Choon v. Tahansan Sdn. Bhd. [1987] 1 MLJ PC 433
Waman Shriniwas Kini v. Ratilal Bhagewandas & Co. AIR [1959] SC 689

Legislation referred to:
Contracts Act 1950, s. 24(1), (a), (b), (c)
Control of Rent Act 1966, ss. 2, 10(1), 20(1)(a), (4), 24
Evidence Act 1950, s. 116
Rules of the High Court 1980, O. 20 r. 11, O. 25 r. 4

For the plaintiff - M.S. Murthi; M/s. Murthi & Partners
For the 2nd defendant - G.C. Proctor; M/s. Y.S. Woo & Proctor

JUDGMENT

Lim Beng Choon J:

Prior to the filing of this originating summons, the plaintiff had instituted an action by Originating Summons No. 31-F871-86 on 7 April 1986 against one Ramasamy a/l Narayanasamy, who was the husband of the 1st defendant in this originating summons claiming *inter alia* that there was an oral tenancy between the plaintiff and the said Ramasamy for the premises at No. 39, Jalan Tengku Kelana Kelang and that consequent upon the said claim the plaintiff

was entitled to the protection of the Control of Rent Act 1966. That action was not litigated as the parties tried to settle the matter out of Court. Presumably that matter was not pursued any further upon the death of the said Ramasamy on 24 November 1986.

Again prior to the filing of this action, the plaintiff had instituted a writ action registered as Civil Suit No. F22-394-86 on **10 September 1986** against Rejendran s/o Gurusamy, the 2nd defendant in this originating summons where he asked *inter alia* for the following reliefs:

(a) An order that the consent order dated 11 April 1986 entered in the Civil Suit No. F240/85 at Kuala Lumpur High Court, be impeached or be set aside;

(b) Consequent upon prayer 1 (it should read prayer (a)) above, an order that the plaintiff be at liberty to restore the claim against the defendant and to proceed with the trial of the Civil Suit F240/85 in Kuala Lumpur.

After the pleadings were closed in the aforesaid writ action apparently no further steps were taken to pursue the said action and instead the plaintiff filed the present originating summons on 23 February 1987 in which he asked for the following reliefs:

(1) That it may be determined upon the true construction of the consent order dated 11 April 1986 in the Civil Suit F240/85 and the letter dated 14 May 1986 from the 2nd defendant to the predecessor in title to the 1st defendant and the tenancy agreement dated 23 June 1986 between the plaintiff and the predecessor in title to the 1st defendant and the letter dated 5 December 1986 from the 2nd defendant to the predecessor in title to the 1st defendant and the reply thereto dated 5 December 1986 to the 1st defendant and read together with s. 2 of the Control of Rent Act 1966 that the lawful landlord of the plaintiff is the 1st defendant, or the 2nd defendant.

(2) Consequent upon the determination under para. 1 an order restraining either the 1st or the 2nd defendant from interfering, harassing, claiming rent, levying distress or entering the premises at No. 39, Jalan Tengku Kelana, Kelang without leave of this Court.

(3) That provision may be made for the cost of this application.

(4) That such further or other relief as may be granted as this honourable Court may think just and expedient.

Thereafter the plaintiff applied by way of an *ex parte* summons-in-chambers for an interim injunction restraining both the defendants from asserting their rights as landlord in respect of the premises as No. 39, Jalan Tengku Kelana, Kelang (hereinafter referred to as the disputed premises) either by entering, repossessing, ejecting, evicting, harassing, levying distress or in any other way interfering with the quiet enjoyment of the possession by the plaintiff. I granted the interim injunction on 24 February 1989. The 2nd defendant's subsequent application to set aside the interim injunction was rejected by me.

Before I proceed to deal with the present originating summons of the plaintiff, it is relevant for me to make some comments regarding the manner in which Counsel for the plaintiff, Mr. M.S. Murthi, conducted the case and also certain statements made by him in his written additional submission dated 26 December 1990 (hereinafter referred to as "Mr. Murthi's additional submission" or "his additional submission" as the case may be).

When the present originating summons of the plaintiff came on for hearing in open Court on 19 October 1989 at 11 a.m., Counsel for the 2nd defendant, Mr. G.C. Proctor, and the 2nd defendant were present but the plaintiff and his Counsel, Mr. Murthi were absent. I was, however, informed by Mr. Proctor that Mr. Murthi and his client were present in Court earlier.

On seeing that I had some chamber matters to attend to, Mr. Murthi told Mr. Proctor that the former was going out to have his breakfast and he left the Court at about 10.20 a.m. I, therefore, stood down the case until the return of Mr. Murthi and the plaintiff. At about 11.40 a.m. I resumed hearing of the case but the plaintiff and Mr. Murthi were still absent. I therefore struck out the present originating summons of the plaintiff. At about 12 noon Mr. Murthi saw me in my chambers to request me to reinstate the said originating summons and to proceed to hear the case. By that time Mr. Proctor and the 2nd defendant had already left the Court. I therefore directed Mr. Murthi to make a written application for the reinstatement of the said originating summons which he subsequently did so. At the hearing of the application for reinstatement on 1 November 1989, Mr. Proctor did not raise any objection to the application and he only asked for costs. I duly allowed the present originating summons of the plaintiff to be reinstated with costs to be paid to the 2nd defendant in any event. Thereafter Mr. Murthi informed me that the parties had agreed that the disputes raised in the present originating summons of the plaintiff could be disposed of without the need to adduce oral evidence and to call any witness. Both Counsel would rely solely on the affidavit evidence to formulate and file in their respective written submissions. Mr. Murthi also said that should I feel that there was a need for further clarification on any matter I could direct both Counsel to appear in open Court to sort out the matter. Thereupon I made an order that:

(1) Statement of agreed facts to be filed,

(2) Written submission of Counsel for the plaintiff (to be filed) on or before 1 December 1989,

(3) Written submission of Counsel for the 2nd defendant (to be filed) on or before 15 December 1989,

(4) If any reply (is) necessary it is to be submitted on or before 7 January 1990,

(5) If Court is in doubt (of any matter) Counsel to make oral submission to clarify.

Mr. Murthi filed in his written submission on 29 November 1989. In his written submission he merely stated the purported transactions and events that gave rise to the disputes between the parties and based on the purported transactions and events he submitted that the 2nd defendant could not rely on the consent judgment recorded by this Court in respect of Civil Suit 240 of 1985 on 11 April 1986 (hereinafter referred to as "the consent judgment") to set up the relationship of landlord and tenant between the plaintiff and the 2nd defendant. I shall have more to say about Mr. Murthi's written submission later. For purpose of these preliminary comments, I need only to take note of the following statements made by him in paras. 64 and 65 of his written submission which read as follows:

> 64. At the hearing of this summons I shall make the submission on law with authorities to back up the same.
>
> 65. Accordingly I pray that a date be fixed on points of law to be argued in open Court.

Bearing in mind that in suggesting that both Counsel would file in written submissions thereby saving the time of the Court in hearing the case and submissions of Counsel in open Court, which led me to make the order of 1 November 1989, these two statements of Mr. Murthi are indicative of his failure to comply with my order. I would expect him to file in a complete written submission on both fact and law relating to the case. That being the case I have no hesitation in holding that Mr. Murthi deliberately made the abovestated statements in his written submission of 29 November 1989 because he had not yet done his 'getting up' in

respect of the law to support his contentions and he needed time to look up the law. Be that as it may, Mr. Proctor filed in his written submission on 3 January 1990 with a letter of apology for the late delivery of the said submission. Here I must say that Mr. Murthi was kind enough not to object to the slight delay on the part of Mr. Proctor in filing his submission. However that may be I still have more to say about Mr. Proctor's written submission. For purpose of the preliminary comments I need only to cite one passage of Mr. Proctor's submission which reads:

> 4. When the parties appeared before Your Lordship on 1 November 1989 on the application of the plaintiff to reinstate the above originating summons which had been struck off, Mr. Murthi of Counsel for the plaintiff astonishingly asked this Court to dispense with the oral evidence of the parties and instead told the Court that he was prepared to rely on the affidavits filed and would submit a written submission.

Mr. Proctor then went on to cite the case of *Scotch Leasing Sdn. Bhd. v. Perwira Bank (M) Berhad* [1987] CLJ (Rep) 974 where my brethren Y.A. V.C. George held that:

> where there is a controversy disclosed by affidavits the Court should hesitate in making a finding of fact. It seemed to the Court that the plaintiff having initiated the proceedings by originating summons and having taken the matter this far had to sleep in the bed made by it.

Mr. Proctor cited this case apparently to support his contention that as Mr. Murthi who had conduct of the case had chosen not to adduce evidence and to file in a written submission based on affidavit evidence, he could not resile from the step taken by him.

There was no response to Mr. Proctor's submission and instead Mr. Murthi wrote a letter dated 19 February 1990 to Mr. Proctor, carbon copied to this Court, indicating that the parties should first formulate and file a statement of agreed facts before written submission could be filed. He also said that he filed his written submission of 29 November 1989 simply because he would not be accused of any delay on the part of his client. He therefore asked Mr. Proctor to co-operate with him to prepare a draft set of agreed facts failing which he would prepare a draft and send it to Mr. Proctor for approval. In response Mr. Proctor wrote to Mr. Murthi on 21 February 1990 indicating that he would not be prepared to draft the agreed facts and that Mr. Murthi could if he wished draft the agreed facts and send it to him for approval even though he doubted that it would resolve all disputes as to facts.

In such a state of affairs I felt that since Mr. Murthi's first written submission was incomplete whilst Mr. Proctor's submission had dealt with both facts and law, it would not be fair to the plaintiff should I proceed to make a decision based on the written submissions of the Counsel. I therefore directed my secretary to write (which she did on 26 November 1990) to Mr. Murthi to remind him that by my order of 1 November 1989 Counsel for the plaintiff should submit a written submission on or before 1 December 1989 and that since Mr. Murthi's first submission was incomplete I directed him to file in a further complete submission with liberty for the Counsel for the defendant to reply if necessary. The letter was carbon copied to Mr. Proctor who then wrote in to suggest that the plaintiff's Counsel should be directed to file in his further submission within a period of two weeks since the matter had been outstanding for quite some time and the 2nd defendant had not been paid the rentals for over five years. Mr. Proctor's suggestion seemed reasonable. I therefore directed my secretary to write (which she did on 15 December 1990) to Mr. Murthi to file in his further submission within two weeks from the date of the letter failing which I would make a decision based on the available written submissions. On 26 December 1990 Mr. Murthi duly filed his additional submission. Again I do not propose to cite at length the assertions and contentions made by him in his additional submission at this stage. I need only to mention that firstly he argued

that as the parties had failed to formulate and file a statement of agreed facts as directed by me *vide* my order of 1 November 1989, all other directions made in the said order which were consequential to the filing of the statement of agreed facts ceased to have any effect and therefore the filing of written submissions served no useful purpose as they would be meaningless. He insisted in saying that the statement of agreed facts was "the *sine qua non* of the proceedings subsequent to 1 November 1989." He then proceeded to state in paras. 14 and 15 of his additional submission that:

> 14. In the light of it, it is wrong for His Lordship to direct by his letter of 15 November 1990 to say that if the plaintiff does not file his written submission the Court will make a decision based on the submissions that are presently available.
>
> 15. It is my humble submission that the Court must follow its own direction which it made after the parties agreed to dispense with oral evidence on 1 November 1989.

Now it is my considered opinion that the aforesaid statements contained in paras. 14 and 15 of Mr. Murthi's additional submission is utterly unwarranted and highly mischievous if not contemptuous and I say so for these reasons. If as he agreed that the filing of the statement of agreed facts was a *sine qua non* of all subsequent proceedings as directed by my order of 1 November 1989, he should **not** have filed his first written submission in which he set out the facts of the case and the events that took place and based on these facts and events he urged this Court to declare that the plaintiff was the lawful landlord. He chose, however, to reserve the right to make a further submission on the law and with authorities to support his argument. There was not a single word stated in first written submission regarding the omission of a statement of agreed facts let alone his subsequent contention that such a statement was *sine qua non* to the subsequent proceedings as stated in my order of 1 November 1989. If that be his view he should not have filed in his first written submission - he could and should have made an application to this Court either to settle a statement of agreed facts pursuant to O. 25 r. 4 of the Rules of the High Court 1980 or for further directions or a variation of my order of 1 November 1989. It is certainly not within my province to compel the parties to agree to the facts although I can penalise a party with costs for failing to admit facts that are indisputable. What is more important is that it is not my function to dictate to the parties as to what evidence they should and should not adduce. If an authority is necessary to support my propositions I would refer to the case of *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 MLJ PC 433 where Lord Templeton said at 436:

> In civil proceedings the trial Judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings the trial Judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The Court cannot give a direction about evidence unless one of the litigants desires such direction to be made.

In the present case Mr. Murthi chose not to do anything even after Mr. Proctor had filed his written submission on 3 June 1990 supported by authorities. In any event Mr. Murthi could have taken the initiative to draft a statement of agreed facts and send it to Mr. Proctor for his approval. Surely there were some facts that could not be disputed and which Mr. Proctor could not but agree to such facts. Having failed to do his duty, Mr. Murthi then indicated to Mr. Proctor that he would seek direction of the Court on the question of the formulation of a statement of agreed facts. Having made such an indication it is, to say the least, extraordinarily strange that he should choose to file his first submission instead of applying to this Court for directions! It was only in his second additional submission that he raised the contention that "the agreed facts is the *sine qua non* of the whole proceedings."

More importantly is that in making the unwarranted accusations in paras. 14 and 15 of his additional submission, Mr. Murthi had either deliberately or inadvertently overlooked the fact that I did what I had done to ensure that justice would be done to the plaintiff. Had I proceeded to decide on the case based on the submissions available at the material time, it would certainly be unfair to the plaintiff. Under the circumstances Mr. Murthi's unwarranted accusations would certainly affect not only me as a Judge but also the integrity of the judiciary. Hence I have to make these comments in order to indicate to Mr. Murthi that he should not make unfounded, unwarranted and unjustifiable accusations against Judges.

I shall now proceed to consider the merits of the case. At the outset I must at once say that I must and indeed I have put aside what had transpired between Mr. Murthi and this Court. Those matters which I have adumbrated above will **not** in any way affect my determination of the case for the plaintiff or the case for the defendants. I will and I must consider the present case solely on the affidavit evidence and the submissions of Counsel on the merits of their respective contentions so that justice will not only be seen to be done but that justice will in fact be done to the parties.

Notwithstanding the number of writ actions and actions by originating summons the real question in dispute boils down to this. Who is the lawful landlord of the plaintiff - the 1st or the 2nd defendant? It would appear to be a simple question but due to the number of actions instituted by the parties particularly the plaintiff, all sorts of allegations and counter allegations were made that rendered this simple question into a complex one. In order to understand the complexity of the case I have to advert to the background that led to the plaintiff instituting the present originating summons action. But before I do that I must mention that Mr. Murthi had prepared a bundle of affidavits filed in this action for the inconvenience of this Court to refer to the relevant affidavits with the exhibits. I shall hereinafter refer to the bundle of affidavits as "the bundle". The historical background of this case the facts of which can hardly be disputed is as follows.

On 7 May 1985, the plaintiff instituted a Civil Suit No. F240 of 1985 against one Sebastian s/o Ramasamy and the 2nd defendant in this action. In that suit the plaintiff contended that Sebastian had concluded an oral sale and purchase agreement whereby Sebastian agreed to sell and the plaintiff agreed to purchase the disputed premises. But when the plaintiff was ready to pay the downpayment of 10% of the purchase price of RM200,000 he came to know that Sebastian had concluded another sale and purchase agreement in respect of the disputed premises with the 2nd defendant (who is also the 2nd defendant in the present action) at a higher purchase price. Furthermore Sebastian had relinquished ownership of the disputed premises and allowed the said premises to be registered under the name of the 2nd defendant. The writ action was therefore instituted by the plaintiff alleging that Sebastian and the 2nd defendant had conspired to defraud him. He therefore *inter alia* prayed for a declaration that the oral agreement made between him and Sebastian was still binding and that the disputed premises be duly transferred to him. At that time the plaintiff was purported to be a subtenant of one Ramasamy a/l Narayanasamy who was purported to be the chief tenant of the disputed premises. After the pleadings in that writ action were closed the 2nd defendant in that case was able to persuade Ramasamy a/l Narayanasamy (hereinafter referred to as 'Ramasamy') to affirm a statutory declaration dated 8 July 1985 by which he gave his consent to allow the 2nd defendant as the owner and landlord of the disputed premises to decontrol the said premises which hitherto was a controlled premises under the Control of Rent Act 1966. With this statutory declaration the 2nd defendant applied to the Rent Tribunal for the District of Kelang to decontrol the disputed premises. As a result the Chairman of the said Rent Tribunal issued a certificate of decontrol in the following form:

Rent Tribunal for the District of Klang
The Control of Rent Act 1966
Application No. 6/85

Rajendran a/l Gurusamy,
No. 7, Jalan Tengku Kelana,
Klang.

Certificate

This application coming on for hearing before the Tribunal and upon hearing the summons dated 27 July 1985 and the application dated 24 July 1985 both filed herein it is certified pursuant to s. 23 of the Control of Rent Act 1966 that the premises No. 39, Jalan Tengku Kelana, Kelang, Selangor are controlled premises **and it is ordered** that upon the service of a copy of this certificate the said premises shall forthwith cease to be controlled premises with effect from 31 July 1985.

Dated this 31 July 1985.

(Signature)
(Mohd. Fouzi B. Wan Abd. Rahman)
Pengerusi
Jemaah Pengadil Sewa
Daerah Kelang.

I shall hereinafter refer to this certificate as 'the certificate of decontrol.'

To make doubly sure that Ramasamy would keep to his words the 2nd defendant entered into an agreement dated 1 August 1985 with Ramasamy (see p. 31 of the bundle) by which he agreed to compensate Ramasamy in the sum of RM40,000 upon the latter's delivery of vacant possession of the disputed premises to him on or before 30 April 1986. I shall hereinafter refer to the said agreement as "the 2nd defendant's 1985 agreement." A sum of RM1000 was paid to Ramasamy upon the execution of the 2nd defendant's 1985 agreement and the remaining sum of RM39,000 to be paid on the date of the delivery of vacant possession of the disputed premises. Ramasamy was given the privilege of not having to pay any rent up to March 1986 but should Ramasamy fail to deliver vacant possession of the disputed premises on or before 30 April 1986 he would be liable to pay all arrears of rental from the date of 2nd defendant's 1985 agreement and time was the essence of the said agreement.

Armed with the certificate of decontrol and the 2nd defendant's 1985 agreement, the 2nd defendant tried to negotiate with the plaintiff to withdraw his Civil Suit F240 of 1985 based on certain terms suggested by the 2nd defendant. At first the plaintiff agreed to those terms and made a statutory declaration at the Magistrate's Court Kelang on 20 March 1986 (see p. 120 of the bundle) consenting to withdraw the C.S. F240 of 1985 against the 2nd defendant and also to withdraw the private caveat lodged by the plaintiff over the land on which the disputed premises was erected. But later the plaintiff made another statutory declaration (see p. 29 of the bundle) denying that what he had affirmed in his first statutory declaration was true on the ground that that statutory declaration was made against his free will and under duress as it was made out of fear for his personal safety. In the result the 2nd defendant commenced further negotiations with the plaintiff and on this occasion the negotiations were carried in the presence of the plaintiff's solicitors, Mr. Murthi. The negotiations culminated in the execution of a memorandum of understanding drafted by Mr. Murthi and signed by the two parties on 9 April 1986 (hereinafter referred to as the memorandum of understanding). By that memorandum of understanding the parties agreed that:

1. Rajendran s/o Gurusamy (NRIC No. 7006078) (the 2nd defendant) agrees to grant the tenancy of 39, Tengku Kelana, Selangor (the disputed premises) to Kuppusamy @ Notaraj s/o Berapans (NRIC No. 7867467) (the plaintiff) from 1 May 1986 for a period of three years with a right of re-entry upon the expiry of the tenancy.
2. The rental shall be RM1,300 per month for 3 years terms.
3. Kuppusamy @ Nataraj s/o Berapans agrees to withdraw the suit (C.S. F240 of 1985) against Rajendran s/o Gurusamy only.
4. Kuppusamy @ Nataraj s/o Berapans agrees to withdraw the caveat on the land, CT10756 Lot 8 Section 6 District of Kelang (on which the disputed premises was built)
5. Kuppusamy @ Nataraj s/o Berapans agrees that the premises to be decontrolled. (Words within parentheses are mine).

On the same day the solicitor for the 2nd defendant wrote to the solicitor for the plaintiff to confirm what were stated in the memorandum of understanding and emphasised that the plaintiff would grant vacant possession of the disputed premises on 30 April 1989 to the 2nd defendant to which solicitor for the plaintiff Mr. Murthi gave his consent by appending his signature on a copy of the said letter. The parties thereafter agreed to have the terms of the memorandum of understanding recorded in the form of a consent order by this Court. A consent order was duly drafted and approved by the solicitors acting for the respective parties. Thereupon Mr. Proctor was asked by Mr. Murthi to mention on his behalf when the former appeared in Court to have the said consent order recorded. As the main relief sought by the plaintiff in Civil Suit F22-394-86 is for an order that the said consent order be impeached and/or set aside while in the present originating summons the plaintiff is asking this Court to determine *inter alia* whether upon the proper construction of the said consent order the 1st defendant or the 2nd defendant is the landlord, it is appropriate at this stage to set out the terms of the said consent order recorded by this Court on 11 April 1986 (hereinafter referred to as "the consent order") which are as follows:

Before the Honourable Mr. Justice L.C. Vohrah

this 11 April 1986 In Chambers

Order

Upon the Application of the second defendants abovenamed and **upon reading** the summons-in-chambers dated 1 April 1986 (encl. 40) and the affidavit of Rajendran s/o Gurusamy affirmed on 1 April 1986 and filed herein and upon hearing Mr. George C. Proctor of Counsel for the second defendant and mentioning on behalf of Mr. M.S. Murthi of Counsel for the plaintiff it is ordered by consent:

1. that the plaintiff withdraws his claim against the second defendant;
2. that the private caveat Reg. No. 1535/85 Vol. 44 Folio 19 dated 28 March 1985 entered against the land held under CT10756, Lot No. 8, Section No. 6, Town of Kelang be hereby removed;
3. that the plaintiff be allowed to occupy the shop-house known as No. 39, Jalan Tengku Kelana, Kelang from 1 May 1986 to 30 April 1989 at a monthly rental of RM1,300;
4. that the plaintiff to give up vacant possession of the said shop-house to the second defendant on 30 April 1989;
5. that the plaintiff consents to the second defendant applying to de-control the said shop-house at No. 39, Jalan Tengku Kelana, Kelang;
6. that each party bear his own costs of this action.

Dated 11 April 1986.

(Signed)
Senior Assistant Registrar,
High Court, Kuala Lumpur.

Prior to the execution of the memorandum of understanding and the recording of the consent order, Ramasamy attempted to recover vacant possession of the disputed premises from the plaintiff by force as the latter's subtenancy would expire on 17 March 1986. However the plaintiff applied by way of a originating summons 31-F871 of 1986 dated 7 April 1986 for *inter alia* an injunction to restrain Ramasamy from recovering possession of the disputed premises by force of arms or violence except by due process of law on the ground that there was an oral tenancy grounded on a monthly basis with Ramasamy. At the hearing of the plaintiff's application on 29 April 1986 by consent this Court made the following order as minuted in the relevant file:

> No order on undertaking by Mr. Krishnan (Counsel for Ramasamy) that there will be no repossession on or re-entry until an order to that effect is granted by the Court. (Words in parentheses are mine).

Thereafter Ramasamy refused to perform his obligations under the 2nd defendant's 1985 agreement. In the meantime Mr. Murthi wrote to the President of the Rent Tribunal, Kelang on behalf of the plaintiff on 13 May 1986 stating *inter alia* that the Rent Tribunal had no right to issue the certificate of 31 July 1985 to decontrol the disputed premises as the 2nd defendant had not given up his tenancy to Ramasamy, neither did Ramasamy give up his tenancy to the 2nd defendant. Furthermore as the tenancy of the plaintiff with Ramasamy was on a monthly basis, such tenancy could not be terminated by the landlord. He then warned the Rent Tribunal that if they insisted in carrying out the decontrol exercise, the plaintiff would apply to the Court for an injunction to restrain the Rent Tribunal from doing so. Upon receipt of Mr. Murthi's letter the Rent Tribunal revoked the certificate of decontrol. The 2nd defendant on his part wrote a letter to the solicitors of Ramasamy on 14 May 1986 reminding him of his breach of the agreement entered into between the two parties and added that:

> As your client had failed to give vacant possession he is now liable to pay all outstanding rental amounting to RM4,410 and to refund the deposit of RM1,000.

In the letter of the 2nd defendant a draft variation agreement for the approval of Ramasamy was also enclosed. By the variation agreement Ramasamy was asked to agree to surrender his tenancy to the 2nd defendant upon payment by the latter of a sum of RM39,000 after setting-off the rentals amounting to RM4,410. Ramasamy did not agree to the variation agreement and chose to pay the arrears of the rentals in the sum of RM4,410 and also refund the deposit sum of RM1000 to the 2nd defendant. On 23 June 1986 the plaintiff executed an agreement of tenancy with Ramasamy (hereinafter referred to as the plaintiff's June 1986 agreement) in which it was agreed *inter alia* that in consideration of the payment of a premium of RM50,000 Ramasamy agreed to grant a tenancy to the plaintiff for an indefinite period on a monthly rental of RM315.75 and the plaintiff agreed to accept such a perpetual tenancy on the same terms. It should also be mentioned that as from the date of the recording of the consent order the plaintiff had failed to pay the rental of RM1,300 per month to the 2nd defendant. Instead he chose to pay monthly the rental of RM315.75 to Ramasamy who duly sent the monthly rentals of RM315.75 to the 2nd defendant. But the 2nd defendant refused to accept the rentals and directed his solicitor, Mr. Proctor, to write to Ramasamy (which Mr. Proctor did on 5 December 1986 - see p. 77 of the bundle) stating that:

We refer to your letter of 2 December 1986 and return herewith your UAB cheque No. 802652 for RM947.25 and state as follows:

(1) We had on 12 June 1986 written to you stating that as your client had surrendered the premises to one Kuppusamy @ Nataraj s/o Berapans we were unable to recognise you as the lawful tenant.

(2) Further by surrendering your tenancy you can no longer be considered as the tenant under the Rent Control Act 1966.

In response Ramasamy through his solicitors replied (see p. 78 of the bundle) by stating that he had never at any time surrendered the said premises to Kuppusamy @ Nataraj s/o Berapans and that he still considered himself to be a tenant under the Control of Rent Act 1966. As the 2nd defendant refused to accept the monthly rentals he said that he would pay the same into Court which he subsequently did.

The next step taken by the 2nd defendant to recover vacant possession of the disputed premises was to apply to the Magistrate's Court at Kelang for a writ of distress against the plaintiff for non-payment of rents for a period of over 6 months in 1986. To forestall the distress proceedings the plaintiff furnished a bank guarantee for a sum of RM4000 payable on demand. Apparently the hearing of the distress proceeding was postponed partly because of the bank guarantee furnished by the plaintiff and partly because of the pending two actions filed in this Court by the plaintiff.

As stated earlier notwithstanding the claims made in the writ action registered as Civil Suit No. F22-394-86 and the present Origination Summons No. S7-31-663-87, the underlying question boils down to this: Who is the landlord of the plaintiff - Ramasamy and after his death his wife the 1st defendant, or the 2nd defendant? Before I proceed to answer the question I must also mention that the said Civil Suit and the said originating summons have never been consolidated. This Court has been merely asked to decide on the reliefs asked for by the plaintiff in the said originating summons as the outcome of this action would determine the outcome of the said Civil Suit and further proceedings on the said Civil Suit were stayed (see para. 17 of the further affidavit of the plaintiff affirmed on 24 March 1987 at p. 133 of the bundle). Moreover even if consolidation of a writ action with an action commenced by originating summons is possible which I doubt, no steps have been taken to consolidate the two actions. I shall therefore confine myself in dealing with the reliefs asked for in the present originating summons.

To answer the question which I have posed earlier, it is necessary to refer first of all to the memorandum of understanding and the consent order. In the memorandum of understanding it was stated that the 2nd defendant agreed to grant a tenancy of the disputed premises to the plaintiff commencing 1 May 1986. In the consent judgment it was stated that the plaintiff "be allowed to occupy the shop-house known as No. 39 Jalan Tengku Kelana from 1 May 1986." Because of this difference in expression the plaintiff firstly claimed that the consent order did not reflect what was agreed by the parties pursuant to the memorandum of understanding. This first complaint of the plaintiff is to my mind a frivolous semantic complaint for one should read the consent order as a whole. In so doing it was clearly stated in para. 4 of the consent order that the plaintiff was only required "to give up vacant possession of the said shop-house to the 2nd defendant on 30 April 1989." The statement in para. 4 clearly shows that the plaintiff was not merely allowed to occupy the disputed premises but he was granted a tenancy of the said premises from 1 May 1986 to 30 April 1989 that is to say a tenancy of three years as agreed in the memorandum of understanding. The use of the words "to occupy" to my mind is an accidental slip on the part of the Counsel for the 2nd defendant

as well as Counsel for the plaintiff who must have vetted the draft consent order before it was sent to this Court for recording. I agreed with Mr. Proctor's submission that reading the consent order it is apparent from the language used that a tenancy was intended at all times. As there had been an accidental slip this Court can rectify the said order pursuant to O. 20 r. 11 of the Rules of the High Court 1980 and substitute the words "be allowed to occupy" with the words "be granted a tenancy of." If an authority is necessary I would rely on the case of *Shipwight v. Clements* 38 WR 746 where the words "from perpetual" used in an injunctive order was altered to "during the remainder of the term of the lease." In a more recent case of *Tak Ming Co. v. Yee Sang Metal Supplies Co.* [1973] 1 WLR 300 the Privy Council amended the order of Court to allow interest on the amount of judgment recovered. The second and more serious complaint of the plaintiff was that since pursuant to the memorandum of understanding and the consent order the 2nd defendant was required to give tenancy of the disputed premises to the plaintiff but the 2nd defendant was unable to do so as it was alleged that the 1st defendant was and still is the chief tenant of the said premises, the memorandum of understanding and the consent order is therefore no longer effective because the 2nd defendant was and still is unable to perform his obligation. In answer to this complaint it is to be noted that the plaintiff has been in occupation of the disputed premises even prior to 9 April 1986, the date of the execution of the memorandum of understanding. He has been able to enjoy peaceful occupation of the same where he is operating his restaurant business. There is no evidence that his enjoyment of peaceful occupation of the disputed premises is being or will be interrupted. It is true that the 2nd defendant had applied to the Magistrate Court Kelang for a writ of distress. But the 2nd defendant was compelled to do so because of the plaintiff's failure to pay some 7 months' rental. The distress action was however stayed pending the outcome of the plaintiff's present application made to this Court.

More importantly as the plaintiff had been given peaceful occupation of the disputed premises when he is still enjoying he is estopped by virtue of s. 116 of the Evidence Act 1950 from disputing the title of the 2nd defendant as his landlord. The proposition is well illustrated in the case of *Farngu v. Ram* AIR [1959] Punjab 564. In that case the question posed to the India High Court was whether a tenant was at liberty to deny his landlord's title while he retained the possession under which he originally entered. A.N. Bhandari CJ answered the question in the negative by saying at pp. 564 and 565:

> This section accords statutory recognition to the well-known doctrine that during the existence of the relationship of landlord and tenant the tenant is estopped from denying his landlord's title or from asserting that another person has a better title than the landlord. This doctrine has no application where the landlord's title has expired or has been extinguished or where there has been a fraud on the part of the landlord in the execution of a lease, or where the tenant did not obtain or retain possession under the lease or by virtue of it, or where he has been evicted by title paramount. A person who is evicted by such a title is at liberty to deny his landlord's title for an eviction is equivalent to a termination of the tenancy. Even if a tenant is not actually evicted, but if a judgment of eviction has been passed against him, a tenant is justified in treating the relation of tenancy at an end and at liberty to give a new and rightful character to his possession.

The principle laid down in *Farngu's* case was cited with approval by our High Court in *Tan Kim Kuan v. Liew Yew Sang* [1973] 1 MLJ 213 at 214. In this case Suffian FJ (as he then was) after reviewing another case expounded the principle in this way:

> It seems to me that the effect of the above decisions may for the purpose of this appeal be summarised as follows: for so long as he remains in possession a tenant may not deny the title of his landlord at the beginning of the tenancy. If he wishes to deny his landlord's title at the beginning of the tenancy, he must first surrender possession. But without surrendering possession the tenant may say that his landlord's title has since the beginning of the tenancy come to an end; or that he (the tenant) has been evicted by a paramount title holder; or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he has as a result of such threat attorned to the paramount title holder. (*Ibid.* p. 215).

In applying the provisions of estoppel under s. 116 of the Evidence Act 1950, it is incumbent on the part of the 2nd defendant to plead estoppel. I have examined the affidavit evidence and I am satisfied that the 2nd defendant had done so in his affidavit affirmed on 10 March 1987 (see pp. 87 to 97 of the bundle).

Now in the present case the plaintiff has complete enjoyment of peaceful possession of the disputed premises; his enjoyment of peaceful possession has never been threatened. Hence, he cannot say that his tenancy with the 2nd defendant has come to an end simply because he has been and still is in full possession of the disputed premises. His only complaint is that as the 2nd defendant had failed to terminate the tenancy of the 1st defendant, therefore the memorandum of agreement and the consent order could no longer apply. To this my answer is that the plaintiff cannot rely on the purported tenancy of the 1st defendant which is at the most a subsidiary title to question the 2nd defendant's title as his landlord unless the plaintiff could show a better right to possession in himself which he could only do if he had entered into a tenancy agreement with a paramount title holder - see *Ban Seng v. Yap Pek Soo* [1967] 2 MLJ 156. In the circumstances of this case it is impossible for the plaintiff to establish that there is in existence a paramount title holder because as the 2nd defendant is the registered proprietor and the plaintiff had acknowledged the 2nd defendant's status whereby he agreed to accept a tenancy from the 2nd defendant, the plaintiff is precluded from asserting that there is someone else who holds a better title than the 2nd defendant. Even assuming that the subtenancy created by the plaintiff's June 1986 agreement could be used to extinguish the status of the 2nd defendant as a landlord, I would say that that agreement is either an invalid agreement or a sham agreement devised to deprive the 2nd defendant's right as the lawful landlord of the plaintiff. It is an invalid agreement because Ramasamy, in purporting to sublet the disputed premises to the plaintiff in June 1986, had failed to comply with s. 20(1)(a) of the Control of Rent Act 1966 (Revised 1988) which reads:

> 20(1) Where a tenant has sublet any part of the controlled premises, the tenant shall within fourteen days after each subletting or in the case of a subletting effected before the date of the coming into force of this Act within three months after that date:
>
> (a) supply the landlord with a statement in writing of the subletting, giving particulars of the occupancy, including the name of the subtenant and the rent charged.

It is clear from the affidavit evidence that the plaintiff's June 1986 agreement was made behind the 2nd defendant's back and he knew nothing about it until on 12 June 1986 (see the letter of the solicitor of the 2nd defendant dated 5 December 1986 at p. 77 of the bundle) when Ramasamy tried to send to the 2nd defendant the monthly rentals paid by the plaintiff to him and the 2nd defendant refused to accept them on the ground that as Ramasamy had surrendered the disputed premises to the plaintiff he could not claim to be the tenant in chief of the same; neither could Ramasamy be considered as a tenant under the Control of Rent Act 1966. In any event there is no evidence to show that Ramasamy had complied with the said s. 20(1)(a) which to my mind is a mandatory provision and failure to comply with

the said section would render any subtenancy agreement invalid. Thus it was held in *Tan Ah Seh v. Tan Pek Sui* [1972] 2 MLJ 246 @ 247 FC that tenant who failed to comply with a notice sent by a landlord for particulars of the subtenancy did so at his own peril. The said tenancy agreement is therefore void under s. 24(1)(a)(b) and (c) of the Contracts Act 1950. Thus in *Waman Shriniwas Kini v. Ratilal Bhagewandas & Co.* AIR [1959] SC 689 Kapur J said at p. 694:

> Agreements which seek to waive an illegality are void on grounds of public policy. Whenever an illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. A stipulation of the strongest form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches, it destroys.

Even if I am wrong in holding that the plaintiff's June 1986 agreement is invalid, I have no hesitation in holding that the said tenancy agreement is a sham agreement deliberately entered into between Ramasamy and the plaintiff to deprive the rights of the 2nd defendant as landlord of the plaintiff. Sham has been explained as "a false label in which the express purpose does not correspond with the true purpose." The clearest statement of the principle is that provided by Diplock LJ in *Snook v. London and West Riding Investments Ltd.* [1967] 2 QB 786 at 802:

> Acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* and *Stoneleigh Finance Ltd. v. Phillips*), that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.

The Court in order to determine whether a document or transaction is a sham ought to have regard to all the circumstances - both before and at the time of the execution of the document or creation of the transaction. The undisputed facts of the case which I have taken into consideration in holding that the plaintiff's June 1986 agreement by which Ramasamy purporting to grant a tenancy of the disputed premises to the plaintiff is a sham agreement are as follows:

(1) since 18 January 1971 Ramasamy had sublet the whole of the disputed premises to the plaintiff by several written subtenancy agreements;

(2) the final subtenancy agreement with the plaintiff however expired on 17 March 1986;

(3) on 18 July 1985 Ramasamy made a statutory declaration stating *inter alia* that he had no objection to the decontrolling of the disputed premises;

(4) as a follow up of the aforesaid statutory declaration he executed the 2nd defendant's 1985 agreement on 17 August 1985 agreeing to deliver vacant possession of the disputed premises to the 2nd defendant on or before 30 April 1986 whereupon Ramasamy would be paid compensation in the sum of RM40,000;

(5) on 18 March 1986 Ramasamy by use of force tried to oust the plaintiff from the disputed premises but subsequently he agreed not to reposses or re-enter the disputed premises except by due process of law. This agreement was made by a consent order made pursuant to the application of the plaintiff for an injunction to restrain Ramasamy from repossessing the disputed premises as stated above;

(6) Ramasamy did nothing - he did not follow up with any application to take vacant possession of the disputed premises after the expiry of the subtenancy agreement with the plaintiff on 17 March 1986;

(7) in fact from 19 March 1986 to 23 June 1986 the plaintiff was occupying the disputed premises without paying any rental at all; neither was there any evidence that that plaintiff was allowed to hold over. Under the circumstances I hold as a fact that the plaintiff was in occupation of the disputed premises as a trespasser. There was no longer any landlord/tenant relationship between Ramasamy and the plaintiff;

(8) the inaction on the part of Ramasamy from 18 March 1986 to 23 June 1986 reinforced the proposition that he was no longer interested in the tenancy of the disputed premises;

(9) then came the plaintiff's June 1986 agreement by which Ramasamy agreed to sublet the disputed premises to the plaintiff **for an indefinite period** at a rental of RM315.75 and upon payment of a premium by the plaintiff to him in the sum of RM50,000. In making the said agreement Ramasamy was fully aware of the memorandum of agreement and the consent order made between the 2nd defendant and the plaintiff yet Ramasamy entered into the plaintiff's June 1986 agreement behind the back of the 2nd defendant.

From the aforementioned undisputed facts, it is legitimate for me to draw the following inferences. Firstly Ramasamy and after his death, the 1st defendant, had abandoned their rights to the tenancy of the disputed premises. They and especially Ramasamy had completely surrendered occupation of the disputed premises to the plaintiff and/or assigned their interest in the disputed premises to the plaintiff; hence neither Ramasamy nor the 1st defendant could claim the protection of the Control of Rent Act 1966 - see *Lee Piah Chee v. Sin Chia Soon* [1948] MLJ 20 and *Lee Thim Pung v. Lim Seang Kea & Anor.* [1949] MLJ 69. Ramasamy, therefore, had no right to execute the plaintiff's June 1986 agreement.Secondly in all the subtenancy agreements made between Ramasamy and the plaintiff prior to 23 June 1986, the subtenancies were for a definite period of one,two or three years.Yet in the plaintiff's June 1986 agreement the tenancy is for an indefinite period.Thirdly the said plaintiff's June 1986 agreement was made in consideration of M$50,000 premium which Ramasamy had no right under s. 10(1) of the Control of Rent Act 1966 (Revised 1988) to accept. Fourthy since the rental paid by the plaintiff as subtenant to Ramasamy is only M$315.75 which is the same amount of rental by Ramasamy as chief tenant to the 2nd defendant, it was extraordinary unusual that the chief tenant would not ask for a higher rental from a subtenant as permitted under s. 20(4) of the Control Rental Act 1966 (Revised 1988) if the said agreement was not a sham agreement.

From the aforesaid discussions, the only conclusion that one can arrive at is that the plaintiff's June 1986 agreement is a sham one - Ramasamy was only interested in the unlawful premium paid to him and this was the only inducement that motivated him in executing the said agreement. On the other hand the plaintiff was prepared to execute the agreement because it is clear that it would be to his advantage to get a subtenancy for an indefinite period at a monthly rental of RM315.75 instead of getting only a 3-year tenancy at the monthly rental of RM1300. Furthermore Ramasamy having abandoned his interest in the tenancy had no right to execute the said agreement.

In the ultimate analysis I have no hesitation in holding that on the proper construction of the consent order the lawful landlord of the plaintiff is the 2nd defendant. In arriving at this ultimate conclusion I have not overlooked that in the 2nd defendant's August 1985 agreement it was stated in the recitals that Ramasamy was the lawful tenant of the disputed premises

which was a controlled premises. However that may be as I have found that neither Ramasamy nor the 1st defendant could seek protection under the Control of Rent Act 1966, the 2nd defendant cannot be precluded, notwithstanding the 2nd defendant's August 1985 agreement, to assert his right as the landlord of the plaintiff simply because no one can contract within the provisions of the Control Rent Act 1966 when such contract does not fall within the provisions of the said Act for if it were otherwise it would enlarge the legislative intent - see *Rogers v. Hyde* [1951] 2 KB 923 where it was held that it was clear law that parties could not by contract turn unprotected premises into premises which were legally subject to rent control legislation.

The order of this Court is therefore that on the proper construction of the consent order and other relevant documents adduced at the hearing of the proceedings the 2nd defendant is the lawful landlord of the plaintiff. From my finding I shall make the following consequential orders. Firstly the plaintiff was given a tenancy of the disputed premises commencing from 1 May 1986 and expiring on 30 April 1989 and thereafter the plaintiff must give vacant possession of the disputed premises without any encumbrance to the 2nd defendant. Secondly I further order that the monthly rental for the period commencing 1 May 1986 until date of this judgment is RM315.75 as the disputed premises has not yet been decontrolled by the relevant Rent Tribunal although the plaintiff had agreed that the disputed premises be decontrolled and I hold that he is bound by the agreement. Thirdly all arrears of the rental deposited by the plaintiff into this Court be released to the 2nd defendant and finally costs of this proceeding be paid by the plaintiff to the defendant.

One final word. This case illustrates how an unscrupulous tenant of a controlled premises could easily abuse the privileges granted to him under the Control of Rent Act 1966 in order to make a large profit.

Also found at [1991] 2 CLJ 1540